DEVELOPMENT & COMMERCIAL BANK BHD.

v.

AUN SOON TRANSPORT CO. SDN. BHD. & ORS.

HIGH COURT MALAYA, IPOH
PEH SWEE CHIN J
[CIVIL SUIT NO. 216 OF 1983]
3 JANUARY 1987

CIVIL PROCEDURE: *Application to set aside judgment in default of appearance - Whether default judgment regular - Whether any defence on the merits.*

This was an application by the 2nd defendant (the applicant) to set aside a judgment in default of appearance entered against him. The 2nd defendant, with some others, signed two letters of guarantee in favour of the plaintiff bank undertaking, *inter alia*, the payment to the plaintiff upon demand by the plaintiff, of all money or liabilities owing by a customer of the plaintiff bank, viz., the 1st defendant, for two sums limited to RM100,000 and RM56,000 respectively, in consideration of the plaintiff bank granting an overdraft facility to the 1st defendant, the bank customer. The 2nd defendant did not dispute the signing of the said letters of guarantee nor the amount of the sums due to the plaintiff bank by the 1st defendant.

The 2nd defendant contended that the default judgment was not a regular judgment as the writ of summons was not served on him. He also contended that the plaintiff failed to resort early to realize the amounts of RM100,000 and RM56,000 in the form of a fixed deposit which receipt was placed with the plaintiff as security for the overdraft. The applicant contended that the plaintiff deliberately failed to do this with the intention of increasing the interest payable and also that the plaintiff failed to keep the 2nd defendant informed of the state of accounts between the 1st defendant and the plaintiff bank.

Held:

[1] The default judgment was a regular judgment. The 2nd defendant also failed to establish a defence on the merits because the case of *Kheng Soon Finance Bhd. v. Retnam Holdings Sdn. Bhd. & Ors.* does not apply, as in this case, no charge of land was involved. The nature of the 2nd defendant's allegation of unfairness of the plaintiff's conduct was very vague. If there was an early realization of the fixed deposit receipts, it would mean that the overdraft facility would probably end and if the customer had no cash resources to pay in further amounts into the account the customer would have to cease business, a situation the security by way of the fixed deposit receipts with the plaintiff was meant to avoid in the first place.

[2] There was no obligation, under the letters of guarantee, for the plaintiff to keep the 2nd defendant informed of the state of accounts between the bank customer and the plaintiff.

[3] The plaintiff was like any other bank, which primarily depends upon interest paid by their customers for profit to ensure their existence.

[Application dismissed with costs.]

Case referred to:
Kheng Soon Finance Bhd. v. Retnam Holdings Sdn. Bhd. & Ors. [1983] 2 MLJ 384

Legislation referred to:
National Land Code 1965, s. 256(3)

For the plaintiff/respondent - Lim Seong Chun; M/s. Lim Seong Chun & Co.
For the 2nd defendant/applicant - Raj; M/s. Raj, Selva & Co.

JUDGMENT

Peh Swee Chin J:

I have earlier dismissed an application by the 2nd defendant to set aside a default judgment, (in default of appearance), entered against him. I now give my grounds or reasons.

The 2nd defendant together with some others, signed two letters of guarantees in favour of the plaintiff (bank), undertaking, *inter alia*, the payment to the plaintiff upon demand by the plaintiff of all money or liabilities owing by a plaintiff's bank customer viz. the 1st defendant herein, (hereinafter called the bank customer), for two sums limited to RM100,000 and RM56,000 respectively, in consideration of the plaintiff making or continuing the making of advances to the bank customer. It was not disputed that the money advanced to the bank customer was not a fixed-term loan but by means of what is known popularly as an overdraft facility.

It is to be borne in mind that the 2nd defendant did not dispute the signing of the said letters of guarantee nor the amount of the sum due to the plaintiff by the bank customer.

The first ground of the 2nd defendant's application was that the writ of summons was not served on him. According to him, the Court's process server's affidavit of service showed that it was served on him on 26 April 1983 at No. 211, Jalan Besar, Taiping, but he said that he had by then shifted from this address, in fact, in 1980 and was not residing there at the date of alleged service on him, as he had rented the said premises to a firm called Viwa Video Centre. To back up what he said, he exhibited a copy of certificate of business registration showing the said firm's name and its address of No. 211, Jalan Besar, Taiping.

As against this, the plaintiff exhibited the affidavit of service of the Court's process server, and in it, the process server, who was described by Counsel as an independent person, said that the 2nd defendant had admitted to him that he was the 2nd defendant and that the 2nd defendant had refused to sign an acknowledgement of service. It was deposed on behalf of the plaintiff that the said firm of Viwa Video Centre belonged to the 2nd defendant or his family and a copy of the Form B of business registration showed that Lee Soon Long, a son of the 2nd defendant, was a partner. Further, it was deposed that the 2nd defendant was aware of the proposed proceedings because a letter of demand dated 25 January 1983, (a date prior to date of alleged service aforesaid), was served by means of certificate of posting which was duly returned to the plaintiff as proof of the notice of having been posted.

After the allegations of the plaintiff were made in affidavit and as stated above; the 2nd defendant did not file any further affidavit to contradict such allegations. On the state and basis of such evidence, I was satisfied that 2nd defendant had indeed been served with the writ of summons herein. Thus the default judgment was a regular judgment for which it would behove the 2nd defendant to establish a defence on the merits.

To establish such defence, and as his second ground of application, the 2nd defendant stated that two fixed deposit receipts in respect of two sums of RM100,000 and RM56,000 respectively (corresponding to the aforesaid limits of the amounts covered by the two letters of guarantee) were placed with the plaintiff as security for the money to be advanced to the bank customer with all necessary steps taken to make them realizeable instantly and at any time at the behest of the plaintiff. The 2nd defendant stated that the plaintiff had failed to realize the same to pay itself when there was such default on the part of the said customer.

In this connection, the plaintiff failed to resort early to this way of paying itself deliberately with the intention of increasing the interest payable. The plaintiff had also failed to keep the 2nd defendant informed of the state of accounts between the bank customer and the plaintiff. The 2nd defendant further said that these 2 fixed deposit receipts were realized only by the plaintiff to pay itself on 28 July 1983 in regard to the said sum of RM100,000, and 17 January 1986 in regard to the said sum of RM56,000. The 2nd defendant complained that if the plaintiff had taken such steps earlier, there would not have been any claim against him, and that the plaintiff had acted unfairly.

Against the second ground detailed above, the plaintiff had this to say. The plaintiff denied, through affidavit filed on its behalf, that the fixed deposit receipts were to be used immediately should there be any default by the said customer. If that was true, the 2nd defendant would not have been asked to sign these letters of guarantee, and further, there would have been another document to the same effect, as what was alleged was contrary to the normal ordinary course for the bank. The 2nd defendant could inform himself with the statements sent every month to the bank customer. It was only in November 1982 that the account of the bank customer became dormant and there was no default by the customer before that. It was the practice not for the bank to realize the said fixed deposits unless the depositers themselves requested therefor or there were special circumstances. The plaintiff exhibited a letter from Lee Ah Chong, the depositer of the fixed deposit receipt for RM100,000 requesting for the said RM100,000 to be realized. The said fixed deposit receipt for RM56,000 was only realized in 1986 because the 2nd defendant, (who was the depositer in question), had requested the plaintiff to pay the interest earlier on the said fixed deposit several times, asking the plaintiff not to realize it to pay itself. The plaintiff denied any unfairness towards the 2nd defendant.

The second ground of the 2nd applicant was substantially his complaint of the unfairness of the conduct of the plaintiff. By virtue of the landmark decision of Federal Court in *Kheng Soon Finance Bhd. v. Retnam Holdings Sdn. Bhd. & Ors.* [1983] 2 MLJ 384, questions of this kind can now undoubtedly be raised by a chargor in showing "a cause to the contrary" when the chargee applies to Court for an order of sale by public auction of the charged land. In that case, the Federal Court took into consideration the unreasonable conduct of the chargee in upholding the lower Court's refusal to grant an order of sale to the chargee. Salleh Abas CJ (as he then was), in the course of delivering the judgment of the Court said:

> From the review of the above cases, we are of the opinion that the Court has not only to apply the law but also invoke the aid of equity in order to be satisfied as to whether `a cause to the contrary' has been shown or not. The chargee must not only come to Court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of 'innocent third parties' to be affected by the order.

The Federal Court was concerned with the expression about showing a cause to the contrary as provided in s. 256(3) of the National Land Code.

Here, no charge of land was involved in the instant case, but advance of money on the basis of an overdraft facility, secured by two letters of guarantee (and from the affidavits of the parties herein), also by the deposit of two fixed deposit receipts. Such a claim could normally be resisted by the usual defences in law or in equity. The ratio of the said Federal Court case could not apply to the instant case without qualification, but assuming that it applied in toto to the instant case, I would now deal with it on that basis.

The second defendant's complaint of unfairness of plaintiff's conduct was tied up with an allegation that there was an understanding between the parties that the plaintiff would resort early, to the two fixed deposit receipts aforesaid by realizing them to pay itself as soon as there was a default on the part of the bank customer. The 2nd defendant further said that because of the deliberate delay in realizing them, and paying itself as early as possible, a great deal of interest had accrued, and that if the plaintiff had done so early, there would not have been any claim at all against the 2nd defendant.

The nature of the allegation itself was very vague, and such vagueness was not helped by the total lack of particulars or explanation as to what was precisely meant by a default on the part of the bank customer. The Court was left speculating very much as to what was actually meant. The Court had speculated by suggesting to itself whether it could mean that the bank customer had committed a default by not paying back the amount due on the debit balance of the bank customer's overdraft current account early before the dates when the fixed deposit receipts were realized. If that was so, then one might ask to why there should be overdraft facility in the first place at all? If the plaintiff were to realize the fixed deposit receipts early, and since such fixed deposit receipts being the security for money advanced on an overdraft current account, it would mean that such overdraft facility would most probably end, and for a cheque which the bank customer would like to draw on his current account (for which overdrawing was now not permitted), the bank customer had to pay in money of the same amount to the bank account. If that was so, and if the bank customer had no cash resources except for the overdraft facility, the bank customer would have to cease business, a situation, the security by way of deposit of fixed deposit receipts with the plaintiff was meant to avoid in the first place.

Two other points need to be dealt with but only very briefly. First, the 2nd defendant said that the plaintiff had failed to keep the 2nd defendant informed of the state of account between the bank customer and the plaintiff. The short answer was that there was no such obligation imposed on the plaintiff, a search of the letters of guarantee failed to reveal such a condition. The other was that plaintiff wanted to make profit by making the bank customer pay more interest in failing to resort to the fixed deposit receipts early. I have just dealt with such alleged failure and it is common knowledge that banks, of which the plaintiff was one, primarily depend on interest paid by customers for their existence.

In view of first, the extreme vagueness of the allegation of the 2nd defendant aforesaid; secondly the dire consequences of resorting to the said fixed deposit receipts early; thirdly the said allegation not being supported in any way at all by a letter or any other document and fourthly the allegation not making any sense, or being devoid of any common sense, in my view, the said allegation was not established, and assuming that it was established, it was devoid of any merit and was without avail to the 2nd defendant. It goes without saying that the question of unfairness of the conduct of the plaintiff as raised by the 2nd defendant was a non-starter in the first place and did not arise in any event from the circumstances of this case. The defendant had failed to show a defence on the merits or any substantial ground of defence.

I therefore dismissed the 2nd defendant's application with costs.

Also found at [1987] 1 CLJ 179